channels by licensees who value them the most, who are most likely to construct wireless cable systems, and who are most likely to do so rapidly. The Commission has long held out the promise that wireless cable could emerge as an effective competitor in the video marketplace, leading to more consumer choice, better service and reduced prices. The portions of the order that set rules for new MDS applications will help keep that promise, and I am happy to vote to approve those new rules.

Regrettably, the Report and Order in one respect preserves the failed policy of the Commission's past. Although the Budget Act gives the Commission the authority to auction applications filed before July 26, 1993, a majority of the Commission has decided to resolve pending MDS applications by lottery. This will affect a minimum of 101 applications for five MDS license, and probably more. More than 4,000 applications for more than 350 MDS licenses filed before July 26, 1993, are still pending before the Commission, and there is no sure way to know how many of those licenses will now be distributed by lottery or simply handed out without a lottery if there are no mutually exclusive applications. And while the Commission has dismissed or returned roughly 3,000 applications pending before July 26, 1993, there is no way to know how many of those will be reinstated by the courts and then distributed for free. Because the giveaway the majority mandates cannot be reconciled with the public interest that the Communications Act requires our policies to serve, I dissent from that portion of the Report and Order.

Although this is only the second time I have dissented, in whole or in part, from a

Commission decision, it is not the first time I have dissented from a decision choosing lotteries over auctions. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Memorandum Opinion and Order, PP Docket No. 93-253 (released July 14, 1994) (lotteries for unserved cellular areas) (Commissioners Ness and Chong not participating). I dissent again because the decision to use lotteries here is even less justifiable than in the context of unserved cellular areas. First, lotteries will result in significant windfalls to the successful applicants, who will receive licenses for sites that are 500 percent larger and far more valuable than the ones they applied for. The FCC is not supposed to be the Federal Christmas Present Commission -- particularly in June. Second, lotteries of licenses for small specific sites undermine the Commission's new and commendable policy of awarding authorizations for large geographical areas. That policy is designed to reduce roadblocks to the aggregation of MDS channels within boundaries that the market selects, so that wireless cable operators can put together truly competitive systems. The majority's decision means that fewer vacant channels will be available for those who win Basic Trading Area (BTA) authorizations at auction, and it may mean that BTA authorization holders' rights to vacant channels will be contingent on the Commission's resolution of applications still pending and on judicial review of those applications and those previously dismissed.

I dissent again on the issue of auctions vs. lotteries for another reason. While any single decision to use lotteries instead of auctions may seem in isolation not to be terribly costly, those decisions in the aggregate inflict serious harm on the public interest.

Today's decision is particularly disheartening in light of the eminently sensible alternative that is available. The Commission should recognize that pending MDS applications were filed to provide a service under rules that no longer exist and that the public interest is best served by applying the new MDS rules to pending applicants as well as new ones. The Commission should dismiss all pending applications, allowing applicants who desire to provide the new MDS service to participate in the auction for BTA authorizations.

* * * * *

It is not an oversimplification to say that the Commission's extensive experience with lotteries and its recent experience with auctions lead to two straightforward principles that should be the starting point for our thinking about all licensing decisions: Auctions are good. And lotteries are bad.

There is no longer any serious dispute that sound public policy requires auctioning spectrum licenses except where there are clear and compelling public interest reasons to the contrary. Auctions put licenses into the hands of those who value them most highly, and who are therefore most likely to provide service the public desires and to do so quickly and efficiently. Auctions also permit the U.S. Treasury to recover for the public a portion of the value of the public's spectrum.

Lotteries, meanwhile, do nothing to ensure that the licensee is the person or business

most likely to use the spectrum for the public good. They do nothing to ensure that the licensee will actually use the spectrum to provide any service, much less do so quickly. As Commissioner Ness points out, hundreds and hundreds of MDS licenses granted by lottery were eventually forfeited for failure to construct MDS stations. Under a lottery system, it is only by freakish accident that a spectrum license lands in the hands of those who will use it most productively.

Lotteries not only fail to further the public interest, they actually harm it. As the North American Securities Administrators Association and the Council of Better Business Bureaus have concluded, "[w]hen the federal government holds a lottery, con artists are among those who profit the most."[3] Nothing proves that more than the Commission's unhappy experience with MDS lotteries. As numerous newspaper articles and federal and state investigations have demonstrated, the Commission's wireless cable lotteries have done "more to enrich con artists than to grant ordinary citizens entree into the cable business." A. Crenshaw, "No Jackpot in This Lottery," Washington Post, Apr. 19, 1992.

The mechanism for the con is the "application mill." The Commission's MDS lotteries have led to an "explosion in abusive application mills that seek to reel in unwary small investors with the lure of the latest in high tech and the promises of quick riches." Investor Alert, p. 1. This is not to say that there are no legitimate applications that arrive

[3]North American Securities Administrators Association and the Council of Better Business Bureaus, Investor Alert, p. 1 (April 1992).

through application mills. But there is no doubting that application mills have left many victims in their wake. Victims of application-mill scams include not only unlucky investors but the public as well. The public is harmed both because it is denied fair compensation for use of the public spectrum, and also because applications from application mills, even when granted, too often do not result in the construction of wireless cable facilities. The public is thus denied access to a competitor to wired cable and to the improved service and lower prices we can expect to accompany such competition.

Unfortunately, this discussion of application mills is highly relevant to the question before the Commission. Of the roughly 100 mutually exclusive applications for five sites that the Commission today commits to resolving by lottery, virtually all come through application mills with which the Mass Media Bureau is all too familiar. A single mill, Applied Telemedia Engineering and Management, Inc., is associated with 83 of the applications. That company was the target of a Federal Trade Commission investigation that resulted in the settlement of a federal-court complaint alleging deceptive conduct in connection with MDS applications. While the company denied wrongdoing, it nonetheless agreed, among other things, to the issuance of an injunction requiring that it pay $100,000 to the FTC for consumer redress and that it refrain from deceptive activities.[4] Each of the 83

---

[4]Federal Trade Commission v. Applied Telemedia Engineering and Management, Inc., Final Judgment and Order for Permanent Injunction and for Settlement of Claims for Monetary Relief as to Defendants Applied Telemedia Engineering and Management, Inc., and Gerald Seifer, No. 91-0635-CIV-UNGARO-BENAGES (S.D. Fl., Jan. 12, 1993). See also M. Carnevale, "Miami Firm Faces Lawsuit by the FTC Over TV Licenses; Company Misled Consumers About 'Wireless Cable' Operations, Agency says," The Wall Street Journal, B7, April 2, 1991.

pending MDS applications involving Applied Telemedia was filed before entry of that federal injunction, and most were filed before the FTC action was initiated.

In view of those facts, it strikes me as impossible to reconcile the majority's decision to award pending applications by random selection with one of Congress's main reasons for granting the Commission auction authority in the first place: deep dissatisfaction with lotteries. "[L]otteries have been characterized by 'get rich quick' appeals by firms that would submit an application for a fee, so-called 'licensing mills,' and by licenses landing in the hands of those ill equipped to build or operate a service properly utilizing radio spectrum." House Report, p. 248.

The majority offers equitable considerations and administrative costs as its reasons for choosing lotteries over auctions. Those were the arguments offered in the context of pending applications for unserved cellular areas. They were unpersuasive then. They are even less persuasive now.

With respect to equitable considerations, the majority ignores the critical fact: that what pending applicants applied for no longer exists. The Commission today significantly expands the protected service area for "incumbent" MDS licensees, which includes the pending applicants who have yet to be awarded licenses. Pending MDS applicants sought licenses to provide wireless cable service throughout a 710 square mile area. Lottery winners will receive far more valuable licenses to provide wireless cable service throughout a

3848 square mile area, an area five times as large.

This extraordinary windfall is entirely undeserved. It is highly unlikely that many pending applicants for lotteries invested a significant amount of time or money in developing detailed business plans. Why should they when their chances of obtaining a license were those associated with a lottery? And, at least as a general rule, bona fide businesses forced to apply for a lottery would prefer an auction even now, because competitive bidding is far more likely than random selection actually to reward investment and innovation. While it is true that application mill applicants may have been convinced to "invest" unfortunate sums of money in a chance to win a lottery, that is hardly the kind of investment that sound public policy should reward. The majority tries to make much of the long (and certainly regrettable) delays experienced by many applicants, but I simply do not see how that justifies the windfall the majority awards them, any more than the $155 application fee entitles them to the significant benefit they will receive (the majority, of course, noting that the $155 bet can be refunded, if necessary). These pending applicants never had a reasonable expectation that they would actually win a lottery and receive a license. And given clear Commission policy and judicial precedent, see infra, at 14-15, the applicants were on notice that the Commission might ultimately decline to award the licenses for which they applied, or award the licenses in a different way.

A serious analysis of the equities would have to consider not only the equitable claims of pending applicants, but the equitable claims of others. The majority never considers,

however, whether its decision is fair to those who chose not to apply for a small service area but who would have applied for the larger and more valuable area that will now be given away; or whether its decision is fair to the American public as a whole, which will now be denied compensation for commercial use of the spectrum. Nor does the majority ask whether its decision is fair to residents of the affected areas, who are now less likely to receive the benefits of competition. If, as the majority suggests, delays are critical to an equitable analysis, surely the majority is obliged to consider the delay in rolling out wireless cable serve that a lottery will almost certainly cause.

The majority seeks to sidestep the likelihood of such a service delay by relying on a presumption that lottery winners will actually provide MDS service. See Report and Order, Par. 91 ("[T]here is no evidence before us that [application mill] applicants, if awarded an MDS station license by lottery, would not construct and operate an MDS station"). This presumption is contradicted by the Commission's experience with MDS lotteries, which, as I've mentioned, has resulted in the forfeiture of an embarassing percentage of MDS licenses for failure to provide service. And it is precluded by the congressional finding that lotteries place licenses "in the hands of those ill equipped to build or operate a service properly utilizing radio spectrum." House Report, p. 248. If the Commission is to rely on a presumption in this area, it should rely on a presumption that is the exact reverse of the one it has selected. Lotteries should be spurned absent, at least, clear evidence that lottery applicants will actually construct and operate MDS stations.

With respect to administrative costs, the only issue the majority raises is a trivial one: that an auction would require applicants to update their applications. That strikes me as a cost easily worth bearing given the benefits of competitive bidding. Moreover, the majority fails to say how it can justify not requiring pending applicants to update their applications given that the Commission will now be giving away licenses to provide wireless cable service over vastly expanded areas. Even under our old rules, MDS applicants were required to certify that they have the financial ability to construct wireless cable facilities and to provide wireless cable service for 12 months. 47 C.F.R. 21.17. It strikes me as arbitrary to assume that certifications provided in connection with a small wireless cable service area suffice to demonstrate the financial ability to construct and run a wireless cable operation that would cover an area five times as large. A logical application of our rules, and the only one consistent with a desire to ensure that new lottery winners will actually provide wireless cable service, would require pending applicants to recertify that they are financially qualified.

The majority asserts that its decision "serves the public interest," but its public interest inquiry consists entirely of its (incomplete) equity analysis and its (unconvincing) administrative argument. The Commission, it seems to me, is obliged to engage in a more extensive analysis of the public interest before choosing lotteries over auctions. While the Budget Act does give the Commission the discretion to reject auctions for applications pending before July 26, 1993, proper exercise of that discretion requires considering the public interest factors Congress deemed important enough to place in the Budget Act itself. The majority quite rightly observes that the Budget Act, on its face, does not compel the

Commission to review each of the listed public interest factors in deciding how to resolve pending applications, but nor does it compel consideration of equitable or administrative factors. And contrary to the majority's apparent view, the legislative history of the Budget Act contains no support for the notion that Congress intended the Commission to focus exclusively on equitable concerns and administrative costs. The legislative history of the Section 6002(e), the "Special Rule," reads in full:

> The Conference Agreement adopts the House approach and adds additional language which permits the Commission to use lotteries for applications that were accepted for filing before July 26, 1993. This provision will permit the Commission to conduct lotteries for the nine Interactive Video Data Service markets for which applications have already been accepted, and several other licenses.[5]

If anything, this sparse legislative history -- which suggests only a congressional willingness to tolerate licenses for nine IVDS markets plus "several other licenses" -- precludes the majority's approach, under which lotteries would be used for a far greater number of licenses, in MDS and other services. It certainly does not support the majority's apparent view that it is inappropriate to consider factors other than the equities and administrative costs. The question, to paraphrase the majority, is not whether we are *required* to consider the statutory public interest factors, but whether we *should*. I think the answer is obvious. And I think that the decision to resolve pending MDS applications by lottery cannot be squared with those statutory factors.

First, the majority's decision to distribute pending MDS applications by lottery will

---

[5]H.R. Rep. 103-213, 103d Cong., 1st Sess. 498-499 (1993) (Conf. Rep.).

not promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A). We can confidently infer from experience that the lottery winner is unlikely on its own to construct an MDS facility within one year, as required, at which point the spectrum will return to the Commission and have to be redistributed. Second, the majority's decision to distribute pending MDS applications by lottery will not promote "economic opportunity and competition" and will not ensure that new and innovative technologies are readily accessible to the public by encouraging small businesses, rural telephone companies, and businesses owned by minorities and women to become licensees. 47 U.S.C. 309(j)(3)(B). Random distribution of licenses is the antithesis of a Commission policy to ensure the diversity of licensees, and a spectrum licensing method that we know from experience to be inconsistent with a rapid build out ensures neither economic opportunity nor the ready accessibility of new technologies.

Third, the majority's decision to distribute pending MDS applications by lottery obviously does not promote the "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource." 47 U.S.C. 309(j)(3)(C). It is hard to predict the revenue that the U.S. Treasury will be denied as a result of the majority's decision, particularly when the universe of sites subject to lottery may expand if the Commission does not dismiss as-yet reviewed applications or if the court reinstates applications that have been dismissed. We can be certain, however, that a lottery

will generate no revenue at all, and that whatever amounts an auction would generate would be very warmly received by Congress and the Treasury.

Finally, the majority's decision to distribute pending MDS applications by lottery is utterly inconsistent with the Commission's obligation to promote "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. 309(j)(3)(D). An auction winner would have an economic incentive to design and build its system to offer low-cost service to the public by, among other things, using spectrum-efficient technology that minimizes the need for future upgrades of its facilities to accommodate spectrum shortages. By contrast, a lottery winner, if it actually did build out its system, would be more likely to construct a system using relatively inexpensive, spectrum-inefficient technology, to allow for the sale of its license as soon as our rules permit.

Three alternatives to lotteries present themselves. The Commission could require pending applicants to bid for the specific sites for which they applied. While better than a lottery, that is ultimately an unsatisfactory alternative given the likelihood that pending lottery applicants -- the bulk of which, again, came through application mills -- are not prepared to construct MDS stations and provide wireless cable service. The Commission could reopen the filing window and then subject those specific sites to competitive bidding. But that would leave the Commission in the business of licensing small specific sites, when the rest of today's Report and Order rejects that approach in favor of one that primarily relies on authorizations to rationalize wireless cable service within a large geographical area.

The order quite persuasively explains the substantial public policy benefits of such an approach, with which, again, the majority's decision is inconsistent.

Plainly, the preferred alternative flows from recognizing that licensing additional MDS stations on a small site-specific basis, as proposed in the pending applications, would frustrate the important public policy goals that the Commission's new approach to MDS furthers. The new rules, which require (among other things) that applications may be filed and granted only on a BTA basis, should apply to all pending applications for new MDS stations. Because pending applications are not consistent with the new rules, they should be dismissed, with applicants who desire to reapply and participate in the BTA auctions free to do so. Such a dismissal would cover not only pending mutually exclusive applications for MDS licenses, which the majority would distribute by lottery, but also pending applications for which there is no competitor. A logical consequence of the majority's failure to dismiss pending applications is that applicants not facing mutual exclusivity would be entitled to receive MDS channels for free, no matter the public interest reasons for awarding those channels to the BTA authorization holder.

Although it states that there are "several potential drawbacks" to this approach, the majority mentions just one: that dismissal would lead to delays because there would be reconsideration proceedings at the Commission and legal challenges in court.[6] But there is

[6]In the same paragraph, the majority asserts that "while we are changing conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection to encourage aggregation

ample Commission precedent and clear legal authority for dismissing pending applications that are inconsistent with new Commission rules, as Commissioner Ness explains. See also See Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985). And the majority overlooks the risk of legal challenges associated with the course it has chosen. Many of the pending applications that Commission has dismissed are awaiting judicial review, and those that the Commission dismisses in the future will likely also end up in court. These cases could take a longer time to resolve than a challenge to a blanket dismissal order, if there was one, since they involve a variety of reasons for dismissal. If pending applicants eventually prevail in those lawsuits, the result could well be further litigation when those applicants claim a right to vacant channels for which BTA authorization holders thought they had paid.

Meanwhile, bidders and BTA authorization holders will have to contend with the uncertainty associated with dismissed pending applications awaiting judicial review. They will also have to deal with the burdens of negotiating with lottery winners -- the five sites we know about as well as those that we now do not, as well as those non-mutually exclusive applicants who will simply be given their licenses for free -- in order to accomplish the aggregation of wireless cable channels that the Commission, in the portions of the Report and Order that I join, says its new rules promote. Quoting Maxcell Telecom Plus, Inc. v. FCC,

---

of available channels, we are not fundamentally changing the nature of the service." The facts in that sentence provide not a drawback to dismissing all pending applications, but the main reasons for doing so.

815 F.2d 1551, 1554 (D.C. Cir. 1987) -- a case in which the D.C. Circuit upheld a Commission decision to apply new rules to pending applicants -- the majority purports to "balance the 'ill effect' of the new [MDS] rule[s] on the pending applicants with the 'mischief of frustrating the interests the rule[s] promote.'" Report and Order, par. 95. Even if the Commission could properly ignore the equitable interests of those other than pending applicants, and even if the Commission could properly decline to bring the Budget Act's public interest factors to bear on its decision, I have no doubt that the "mischief" to the new MDS framework that will be caused by the majority's decision far outweighs the minimal "ill effects" of applying the new MDS rules to pending lottery applicants.

Separate Statement
of
Commissioner James H. Quello

June 15, 1995

Re: Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service (MM Docket No. 94-131) and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (PP Docket No. 93-253)

I would like to make a few brief comments today on the issue of auctions versus lotteries for pending applications. Before I do so, I want to congratulate Barbara Kreisman and her staff for their diligence and hard work in reducing the backlog of MDS applications. This Commission unanimously agrees that the three items today will go a long way toward making this service a reality, which will benefit the American public by bringing a wireless competitor to cable television.

Where we disagree is on the decision of how to treat pending applications during a time of transition from one licensing methodology, lotteries, to another, auctions. I will not belabor the relative problems or benefits of lotteries or auctions because this should not be a philosophical debate.

We have before us approximately 100 applications for five sites that were filed many years before this Commission received auction authority. Such auction authority, I might note, was received during my tenure as Chairman. We were specifically granted discretion at that time, however, to determine how to process what I will call "pre-filed and accepted" applications for various communications services. But for our own administrative inability to process thousands of MDS applications in a timely manner we would not be faced with the problem of what to do with these applications that have been languishing in regulatory "Limbo" for over four years.

The record does not evince any *mal fides* or intent to deceive by not constructing on the part of the applicants. We must therefore conclude that these applications were filed in good faith with the expectation that they would be processed under the rules in existence at the time of filing. Even though we have decided to modify the service somewhat we should not punish those applicants who were caught in the transition through no fault of their own. I believe that they have a significant vested equitable interest in having the applications that they paid fees to file processed in accordance with their expectations and our rules at that time.

As this Commission has faced this issue in other services, such as Cellular Unserved for example, I have consistently maintained -- and will continue to conclude -- that unless directed otherwise by Congress, we should exercise the discretion we have been given to treat pending applicants fairly which means processing their applications under the rules extant at the time of filing. In this instance, this means that we should, as I believe the majority will decide, lottery the pending 100 applications for the five MDS sites and then proceed to auction new applications.

In summary, I believe that it would be inequitable and administratively burdensome to force applicants for MDS station licenses, who filed their applications many years ago in reliance upon the lottery rules then in effect, to participate in an MDS auction, which -- unlike a lottery that can be held almost immediately -- cannot be held until the end of this year, which would, yet again, delay service to the public.

Long before it became fashionable to talk about "serving our customers," I have endeavored to decide the matters before us by using common sense and fairness based on the facts. I do not believe it is our function to justify desired outcomes through legal technicalities. The fact that something is legally permissible does not make it right or fair.

I have uncharacteristically spoken at some length today because I want to convey my deep-seated conviction that pending applications should be treated fairly by processing them under the rules in effect at the time of filing.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Amendment of Parts 21 and 74 of the Commission's Rules With Regard To Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act-Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253.

By the Commission's actions today, we adopt rules to facilitate the continued deployment of Multipoint Distribution Services ("MDS"). In doing so, we process thousands of applications and initiate a competitive bidding process for the licensing of MDS. In order to process the remaining acceptable, mutually exclusive applications for MDS station licenses that were filed prior to July 26, 1993, when the Commission first received auction authority, the Commission has determined to employ a lottery rather than an auction procedure.

I support the use of a lottery for these pending mutually exclusive applications for several reasons. First and foremost, because I believe that there are compelling public interest justifications for doing so as I did when the Commission decided how to license the cellular unserved areas.[1] The pending applications in this proceeding were filed more than four years ago and the applicants relied in good faith on lottery procedures in existence at that time. Moreover, it is apparent that the delay in processing these applications was of no fault of these applicants. Therefore, it appears unreasonable to now subject their applications to a modified licensing procedure.

Second, some have argued that applicants who have filed by way of "application mills" are in large measure applicants that lack the wherewithal to build or operate the systems that are licensed to them. Moreover, some contend that these applicants tend to unnecessarily delay service to the public. Simply put, we cannot unequivocally determine that these MDS applicants have no intention of constructing the facilities in order to provide service to the public. Indeed, one could argue that the utilization of auctions does not necessarily guarantee service in

---

[1] See, *Memorandum Opinion and Order*, Cellular Unserved Areas (License Selection Procedures), 9 FCC Rcd 7387, 7391 (1994). In this decision, we specifically held that to move from lotteries to auctions in the licensing of cellular facilities would be unfair to those applicants who relied in good faith upon existing lottery procedures.

a timely fashion. Finally, as a member of the "old regime," I am loathe to making the assumption that an applicant seeking a license under the lottery procedure is less likely to intend to construct facilities than an applicant seeking a license under the competitive bidding process.

In addition, some have argued that these applicants will receive an added benefit as a result of being granted a larger BTA. However, the modification we make today with respect to the protected service area will benefit current licensees who through the lottery process were granted a 15 mile protected service area. Moreover, I am not convinced that our decision today will interrupt the aggregation of licenses as some have alleged. That aggregation is already occurring, and I believe, will continue to occur and will not necessarily cease because licenses for these few locations will be subject to the lottery process.

While this action may delay the commencement of the auctions, for which authority was obtained under Commissioner Quello's leadership, I believe that the Commission is doing the right thing by using a lottery procedure to process the remaining previously filed MDS applications. In my estimation, to do otherwise would not only contradict precedent, ignore the principle of fairness as well.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

DISSENTING IN PART

Re: *Licensing and Service Rules and Competitive Bidding Procedures for Multipoint Distribution Service*

I fully support the new rules for MDS[1] licensing that we adopt today. I am confident that the licensing of MDS on a regional basis through competitive bidding will enhance existing wireless cable systems and bring about the construction of new systems in unserved areas. However, I dissent from that portion of the decision concerning our treatment of pending applications.

I believe that the public interest would have been better served by applying our new rules to the pending MDS lottery applications, resulting in their dismissal, and permitting those applicants who choose to do so to bid in future MDS auctions.

I do not favor using auctions at all costs. There may be some situations where, in light of all the factors, lotteries would be in the public interest. This is not such a case.

I do not believe that the approach adopted today by the majority -- to permit pending applications to be awarded under the old lottery rules, but to enable them to benefit from the expanded protected service areas of the new rules -- serves the public interest. It does not comply with Congressional intent or Commission policy to reward speculation in this manner. It will delay, rather than enhance, the construction and growth of wireless cable services.

I would prefer that the pending MDS applicants be subject to the competitive bidding procedures adopted today for new MDS applicants. Congress gave the FCC the authority to auction licenses, rather than award them by lottery, where mutually exclusive applications have been filed. Congress concluded that auctions, rather than lotteries, would better ensure that spectrum licenses will be awarded to those who most value them.

The Omnibus Budget Reconciliation Act of 1993 ("OBRA") gives the Commission discretion to use either competitive bidding or lotteries for applications accepted for filing prior to July

---

[1] "MDS" as used herein refers to both single channel Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS).

26, 1993. The MDS pending applications present us with the opportunity to exercise that discretion and to determine which approach best serves the public interest.

There are over 4,000 MDS applications pending at the FCC which were submitted before July 26, 1993. A small fraction of these applications have been accepted for filing. These applications were submitted under our old, pre-OBRA rules that authorized lotteries for specific geographic sites.

The beneficial effects of using auctions are perhaps most evident in services where speculation has been rampant. MDS has just such a history. Over the last 27 months, over 1100 MDS authorizations have been cancelled or forfeited for failure to construct. Why? Because lotteries attract speculators -- individuals who have no relevant experience and no serious intention to construct and operate a wireless cable system.

The high level of speculation has meant delay in our efforts to foster the effective delivery of wireless cable service. Incumbent MDS operators have been unable to aggregate additional channels. Potential new entrants have been smothered by the backlog of pending applications.

In February 1993, the Commission took measures to stem the increasing speculation in MDS and to prevent rewarding speculators who had already applied. One measure adopted was a prohibition on partial and full settlement agreements among MDS applicants. The Commission found that few MDS applicants entering settlement agreements had any serious intention to construct; rather, most of them wished to have their applications granted solely for the purpose of later selling their authorizations to wireless cable operators in need of spectrum.[2] In an attempt to ensure that "speculative applicants are not rewarded," the Commission applied the new prohibition on settlement agreements to both future and pending applications.[3]

The new rules we adopt today authorizing the use of competitive bidding to award MDS authorizations will finally eliminate the problems of speculation that have plagued MDS and will ensure that licenses in the future will go to those parties who value them the most.

I recognize that lotteries could be held relatively soon for the five sites where, once our processing is complete, the Mass Media Bureau predicts there will be approximately 100 acceptable mutually exclusive pending applications. But the small number of applications at

---

[2]Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in 2.1 and 2.5 GHz Bands, 8 FCC Rcd. 1444, 1447 (1993)(Report & Order).

[3]Id.

issue does not relieve us of the obligation to make a policy decision that carefully weighs all of the relevant factors.

The evidence is overwhelming that few, if any, of these applicants have a bona fide intention to construct and operate an MDS system. Indeed, the practical result of a lottery in this instance is very likely to be the precise result Congress sought to eliminate when it gave the FCC auction authority. Even in the improbable event that a bona fide applicant wins a lottery, the result will be one more site-specific license encumbering the BTA, further frustrating the new method of licensing that we today embrace as the best approach for the future.

The bona fide MDS applicants among these pending applications that the majority seeks to protect, if they exist, may or may not succeed in an auction. However, an auction at least ensures that they will compete for a license with parties who are equally serious in their commitment to build a wireless cable system, rather than with speculators lacking any intent to construct.

Moreover, the majority has failed to consider the resources required for the further processing of the pending applications required by continuing with lotteries. The public would benefit from the reduction of the administrative burden on the agency by the dismissal of over 4,000 pending applications, the majority of which will be, or have already been, dismissed for technical deficiencies. The blanket dismissal would also render moot the pending court appeals of previously dismissed applications from this group.

The new BTA service areas and technical and operational rules we adopt today represent a very significant change in our licensing of MDS. I am persuaded that, under these changed circumstances, applying our new rules to the pending applications would conform with Commission precedent. The Commission's authority to apply new rules to pending applications is not new and in fact has been invoked previously in MDS. In 1993, when the Commission adopted the prohibition on settlements among MDS applicants described above, the Commission specifically addressed the issue of applying the new rule to pending applications and its authority to do so. The Commission concluded at that time that "[i]t is well-settled that the rules applicable to previously-filed applications may be amended."[4] Indeed, the new rules to expand the protected service areas of incumbents that we adopt today will be applied to pending MDS applications as well.

The Commission has applied new rules to pending applications in other cases. See, e.g., Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of

---

[4]Report & Order, 8 FCC Rcd. at 1447, citing United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

Comparative Hearings, 98 F.C.C.2d 175 (1984), recon., 101 F.C.C.2d 577 (1985); Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, 7 FCC Rcd. 1625, 1628 n. 22 (1992)("the Commission by rule making may adopt threshold eligibility criteria that affect pending applications if it determines that such rules serve the public interest"); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 7 FCC Rcd. 4484, 4489 n. 66 (1992).

In this instance, application of our new rules for competitive bidding to pending lottery applications would necessarily result in the dismissal of those applications. The Commission has previously dismissed pending applications, without prejudice to the applicants' right to re-file, as a result of a change in rules. See Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983)(citing the administrative burdens involved in resolving the changes needed as a result of rule changes, the Commission dismissed 1,400 pending applications and opened a new filing window for applicants to apply under the new rules), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985). All interested pending MDS applicants, once dismissed, would similarly be able to participate in the auctions for MDS authorizations for any BTA under our new rules.

For all these reasons, I believe that the public would be better served if the Commission had chosen to employ competitive bidding procedures for all MDS authorizations and dismissed the pending MDS lottery applications, rather than proceeding with lotteries.